IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.6188 OF 2005

Mohammed Hanif Ismail Sidatar ...Applicant
vs.
The State of Maharashtra ...Respondent

Mr.Sayaji Nangre for the Applicant
Mr.A.S.Gadkari,A.P.P. for State

CORAM: A.S.OKA,J.
DATE : OCTOBER 11,2005

P.C.:

1. Heard Shri Nangre for the Applicant and the Shri Gadkari, A.P.P. for the State. This is an application for bail in a case to which the provisions of the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as MCOC Act) are applicable.

2. The case of the prosecution is that on 14th March 2005 three unknown persons came in an auto rickshaw near Deepa Bar and Restaurant and fired three rounds on Watchman of the said Bar and Restaurant and fled away in the same auto rickshaw. The allegation is that out of three unknown persons, only one open fired on the watchman. On 18th March 2005 co-accused Amit Ramekwal Saurabh, Santosh and Sanjay Thakur @ Bada Sanjay were arrested. It is alleged that on 20th March 2005 at the instance of the co-accused Amit Saurabh a revolver and two cartridges were recovered. On 24th March 2005, the other two co-accused Sanjay Thakur @ Bada Sanjay and Majhar Sattar Sheikh were arrested. On 18th May 2005 co-accused Umar Shah was arrested who had allegedly made confessional statement

before the Deputy Commissioner of Police between 4th June 2005 to 6th June 2005. It appears that on 6th June 2005 the said accused retracted his confessional statement by appearing before the learned Additional Chief Metropolitan Magistrate, Mumbai.

3. Thereafter, on 13th June 2005 the Applicant was arrested in the present case who allegedly made confessional statement before the Deputy Commissioner of Police and retracted the said statement before the Court of Additional Chief Metropolitan Magistrate, Mumbai. The confessional statement of co-accused Umar Shah was recorded before the Deputy Commissioner of Police during the period from 4th June 2005 to 6th June 2005. The confessional statement of the Applicant was allegedly recorded between 8th July 2005 to 11th July 2005 before the Deputy Commissioner of Police. In the said confessional statement, the Applicant allegedly stated that he was carrying on the business of imitation jewellery. He stated that he knew one Umar Shah (co-accused) from the year 1997 who used to ply auto rickshaw. The said Umar was arrested in some other case by the police in the year 1997. He stated that the said Umar sent message to him through one Shakil for making arrangements for defending the said Umar Shah. Accordingly, he arranged for engaging services of an Advocate for Umar and in 2004 the said co-accused Umar was acquitted and thereafter he used to frequently visit the place of residence of the Applicant for having food. According to him, Umar disclosed to him that he had friendship with Yogesh

Gauda @ Shetty. According to him, he was introduced to co-accused Majhar in November 2004. The Applicant developed friendship with one Harshad Rane and the said Harshad Rane handed over one box to the Applicant with instructions to keep the said box with him. Later on the Applicant realised that there was one revolver inside the box. He stated that in January 2005, Harshad died in a police encounter. After few days, Umar Shah informed the Applicant and stated that the Applicant should hand over the revolver to the persons sitting in an auto rickshaw as they needed it for some work. Accordingly, he handed over the box containing the revolver to the said Umar and later on there was a firing made at Deepa Bar and Restaurant. Later on the Applicant retracted the said confession.

4. In his confessional statement, co-accused Umar Shah stated that he became friendly with Yogesh Shetty in Arthur Road jail. After both of them were released from jail in January 2005, the said Yogesh requested the said Umar to give some tips for committing robbery. At the instance of said Yogesh co-accused Umar met another co-accused Major @ Majhar at Andheri Railway Station who also requested the said Umar to give tips for committing robbery. The said co-accused Umar stated that he was not possessing any tip. However, at the instance of the Applicant he falsely told Yogesh Shetty that there were some tips available with him. He stated that on cell phone No.9892833143 he contacted the Applicant and the Applicant handed over a revolver to him for handing over the

same to the co-accused Major @ Majhar. According to the version of the said co-accused, in his presence, the other co-accused Major received a call. While answering the call he stated that the job of Deepa Bar will be done within 2 to 4 days. Co-accused Major told him that the phone call was given by Ravi Pujari and it is the said Ravi who appointed Major to fire the rounds at Deepa Bar. According to him when the Applicant came to know about it, he stated that before firing takes place, he would see that the person who is firing is caught red handed. The said confessional statement has been partly retracted by the said Umar by stating that he has never stated that has given cell phone number of the Applicant or that he had any relation with Yogesh Shetty, Major, Sanjay Thakur and Ravi Pujari.

5. The learned Advocate for the Applicant submitted that even assuming that the statement of the co-accused Umar can be read in evidence, the said statement is antithesis to the prosecution case. According to the Applicant, he did not aid and/or abet the unlawful activity of firing at the watchman of the Deepa Bar and Restaurant. On the contrary the desire of the Applicant was to see that the person attempting to open fire should be caught red handed. He submitted that if this is the only material on record, the Applicant is entitled to be enlarged on bail.

6. He placed reliance on the decision of the Supreme Court reported in 2005 All M.R. page 1538 (Ranjitsingh Sharma vs.

State of Maharashtra and another). He also placed reliance on another decision of the Apex Court dated 4th May 2005 in Criminal Appeal No.668 and 669 of 2005 (Vasanthi Vs. State of Andhra Pradesh) and submitted that as it is difficult to reach a tentative conclusion that the Applicant will in all probability be convicted under the M.C.O.C. Act, he is entitled to be enlarged on bail. The relevant part of the observations of the Apex Court in case of Vasanthi Vs. State of Andhra Pradesh relied upon by the Advocate for the Applicant read thus :

> ." **If we apply the probability test that has been propounded by this Court to the facts of the present case it is difficult to reach a tentative conclusion that the appellant in all probability will be convicted of the offence. Probability of conviction, so to say, is not bright**, when we leave out of consideration the confessional statements."

He submitted that bail can be refused under Section 21 (4) of the MCOC Act when the Court comes to the conclusion that in all probability the Applicant will be convicted.

7. The learned A.P.P. submitted that there are statements of the witnesses that the Applicant was using a particular sim card in the cell phone and the extract obtained from the cell phone company clearly shows that the applicant was in touch

with the co-accused. He submitted that the confessional statement of the co-accused can be read in evidence against the co-accused by virtue of section 18 of the M.C.O.C. Act. He therefore submitted that no interference is called for.

8. It will be necessary to refer to the relevant paragraphs of the decision of the Apex Court in case of Ranjitsingh Sharma (supra). The Apex Court held that distinction imposed by Section 21 (4) of the M.C.O.C. Act cannot be stretched too far. In paragraph No.49, the Apex Court held that,

> . "...**If the Court having regard to the material brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed**..."
>
> (Emphasis added)

In paragraph No.55 of the said decision the Apex Court held thus :

> "55. The wording of Section 21(4) in our opinion, does not lead to the conclusion that the Court must arrive at a positive finding that the Applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a find that the

> applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be intention of the Legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It maintain a delicate balance between a judgment of acquittal and conviction an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. Such an offence in future must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence."

9. The test laid down by the Apex Court appears to be that if the Court comes to the conclusion that there is no possibility of the applicant being convicted on the basis of material on record, then a case is made out under Section 21(4) to grant bail. According to the Advocate for the Applicant in case of

Vasanthi (supra), the Apex Court held that by applying the probability test, the Court will have to ascertain whether the Applicant in all probability will be convicted and if such finding cannot be recorded the accused will have to be enlarged on bail. The decision of the Apex Court in case of Ranjitsingh Sharma (supra) is delivered by the larger bench of the Apex Court. Therefore, so far as this Court is concerned, the law laid down by the the Apex Court in case of Ranjitsingh Sharma will have to be followed and the Applicant can be granted bail only if this Court comes to the conclusion that in all probability the Applicant may not be convicted.

10. Apart from the confessional statements, there is material against the Applicant about possession of the revolver and handing over of the revolver by the Applicant. So far as the confessional statements of the co-accused are concerned, a reference will be made to section 18 of M.C.O.C.Act which read thus :

> "18. Certain confessions made to police officer to be taken into consideration.---
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> (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (I of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not below the rank of the Superintendent of Police and recorded

by such police officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator :

. Provided that, the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

In view of the said section, confessional statement of the co-accused can be the basis of conviction of the Applicant. Whether the statements have been retracted or not is a matter for trial. The said statements will have to be considered as the material against the Applicant.

11. There is a statement of Sayyed Maiuddin Azam and the statement of Nazir Mohamed Khan. Both of them stated that the Applicant and Umar Shah in the month of February and March 2005 were using cell phone No.9821282210 to communicate with the witnesses. The statement of Nazir Mohamed also shows some relevance. The learned A.P.P. has placed reliance on details of the telephone calls made from his cell phone No.9821282210 to show that the Applicant was in touch with the other co-accused persons prior to the commission of offence.

12. Adopting the test laid down in case of Ranjitsing Sharma

(supra) by the Apex Court, this is surely not a case where it can be said that having regard to the material brought on record in all probability the Applicant may not be convicted.

13. There is no merit in the application and the same is rejected.

JUDGE